IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.37 OF 2003

Pandurang Ananda Powar,
R/o Kale, Taluka Panhala,
Dist. Kolhapur .. Appellant
(Orig. Accused)

Vs.

The State of Maharashtra ..Respondent.

Shri S.A. Ingawale for the appellant/accused.
Mrs. P.H. Kantharai, A.P.P. for the State.

CORAM : V.G.PALSHIKAR &
ANOOP V.MOHTA, JJ.

DATE : 2ND NOVEMBER, 2004.

JUDGMENT (PER ANOOP V. MOHTA,J)

. The appellant has preferred this criminal appeal against the judgment and order of conviction passed by Second Ad-hoc Additional Sessions Judge, Kolhapur, whereby, the appellant has been convicted for the offence punishable under Section 302 of Indian Penal Code (I.P.C.) and sentenced to suffer life imprisonment and to pay fine of Rs. 10,000/-, in default to suffer rigorous imprisonment for 6 months. The accused has been also convicted for the offence punishable under Section 342 of I.P.C. and sentenced to suffer rigorous imprisonment for six months.

2. As per the prosecution case, the deceased Dhondiram Baburao Kurade, was serving in Narsingh Beer Bar of village Kale, Taluka Panhala. On 1/11/2001 at 7 a.m. during the quarrel appellant-accused alleged to have been abused and threatened to the deceased. On the same night, therefore, the appellant poured kerosene oil and set the deceased on fire and locked the door of the Beer Bar from out side and ran way. The other persons from the building, thereafter, extinguished the fire. P.W. 4 Kabir, the Manager of the Beer Bar taken the deceased to the C.P.R., Hospital, Kolhapur (for short Hospital). On the basis of F.I.R. the offence in question was registered under Section 307, 342, 504 and 506 of I.P.C. against the appellant. The Investigating Officer (P.W.9) Namdeo, thereafter, visited the spot of incident and panchanama was drawn in presence of (PW.1) Ashok and (P.W. 3) Sardar. On 3/11/2001, the accused was arrested. The dying declaration of the deceased was recorded by the Special Judicial Magistrate, Kolhapur, (P.W.7) Umeshchandra Yadav. On 15/11/2001, the deceased succumbed to the said burns due to septicaemic shock, due to 55% superficial to deep burns. Therefore, the offence was altered and registered under Section 302 of I.P.C. The appellant has denied the charges and pleaded

not guilty. The prosecution has examined 10 witnesses. One Uday Tukaram Kumbhar has been examined by the defence. In the statement under Section 313 of Cr.P.C. the appellant has stated that the deceased used to drink the liquor and always create scenes. On the fateful night one Uday Kumbhar (defence witness) and the deceased come to the appellant's house and they were under the influence of liquor, as they had exhausted 4 to 5 bottles of liquor. The appellant resisted and objected their visit at such odd hours, under the influence of liquor. They both left the house while hurling abuses. The appellant had admitted that four days before the incident quarrel took place between them, therefore, since then he was not on talking terms with the deceased.

3. The learned Judge, after considering the material on the record, held that the accused had committed the murder by pouring kerosene oil and thereafter, wrongfully confined and restrained him and accordingly, passed the order of conviction in question.

4. Heard the learned Counsel appearing for the appellant and the learned A.P.P. appearing for the

State. We have gone through the record with the assistance of the learned advocates for the parties.

5. There is no much dispute about the death of the deceased, as duly proved by the Medical Officer (P.W. 8) Dr. Mahendra, based on the post mortem report and his opinion. The incident was of 1/11/2001 and the deceased died on 15/11/2001. The burns were 55% superficial.

6. The basic reason for conviction revolves around the dying declaration, dated 2/11/2001, recorded by (P.W.7) Umeschandra, Special Judicial Magistrate, Kolhapur. The said dying declaration was recorded after due consultation with Dr. M.V. Phalke (P.W. 8). The medical certificate was also recorded and endorsed before beginning of the dying declaration. After completing all the formalities of putting the necessary questions to the deceased, who stated that at midnight when he woke up for urination, appellant, Pandurnag (Cobler) poured kerosene and set him on fire by means of match stick. The appellant thereafter, bolted the same room from outside and ran away. There is nothing on record to prove that the appellant has poured the

kerosene oil and set the deceased on fire and thereafter, bolted the said Beer Bar from out side. The persons from the locality gathered, as he cried for help and thereafter, he was brought to the hospital. The right hand thumb impression of the deceased was taken on the said statement. The Medical Officer opined, so also endorsed on the same. P.W. 7 in his cross-examination has deposed that he had not mentioned about the minor questions put to the deceased. There was no mention about the place of incident and the reason for such incident. He has deposed that the thumb-impression of the patient was noted initially but it was scratched and thumb-impression of right hand was taken, but the scratched words were not initialled by P.W. 7.The envelope in which the dying declaration was kept on the spot was not sealed. He had supplied the Xerox copy of original dying declaration to the police and not the original. What is needed is that the original declaration should be kept in the envelope and required to be handed over to the police. The dying declaration dated 2/11/2001 was recorded at 12.35 p.m. and in answer to the question No. 8, put up by P.W. 7, the deceased had alleged against the appellant. There is no reference made about any earlier quarrels or any reason

for taking such action by the police against the accused. The endorsement of the doctor shows that he was conscious while making the statement, but mere factor which needs to be endorsed is, his mental condition to make the statement. Patient should not only be conscious but he should be mentally and physically fit to make the statement.

7. (P.W. 8) Dr. Mahendra, who had examined the deceased and also conducted the post-mortem, even though corroborated the recording of dying declaration by P.W. 7, has also endorsed that the said dying declaration was recorded at 12.35 p.m. The said patient died on 15/11/2001 at 2.55 p.m. The deceased was under treatment during this period. This witness has deposed that the patient was in a position to give the statement. There is no case of the prosecution that he was mentally and physically fit to make the statement. This witness deposed, that the deceased had sustained 55% burn injuries. The probable cause of death of the said patient was septicaemic shock due to 55% superficial deep burns. P.W. 8 has deposed that on day pain killer and antibiotic medicine were administered to the patient. However, P.W. 7 has deposed that "Doctor

told him that till that moment no pain killer drug was given to the said patient and only saline was injected" P.W. 8 has further stated that one Dr. Padhye mentioned that the deceased had sustained 40% burn injuries. This witness further deposed that " Patient who is in a condition of talking can be said to be conscious. I have not determined the mental condition of the said patent.I have not noted down the mental condition of the patient in my endorsement." P.W. 8 has further stated that the dying declaration was sealed by P.W. 7, where as P.W. 7 nowhere stated that the dying declaration was sealed after completion of recording of dying declaration.

8. The law of dying declaration is settled through the Apex Courts' decision. Those Khushalrao Vs. State of Maharashtra,reported in A.I.R. 1958 S.C. 22

It was held in the said case that:-

"If the dying declaration is recorded in presence of a doctor, who verified that patient was in a fit condition both mentally and physically and when it is recorded in the hospital. Soon after the patient was admitted and the statement was recorded by the Taluka Magistrate in the proper manner i.e. in the form of question and answer and as far as possible in the words of maker of the declaration, the conviction can be based alone

on such dying declaration."

The Supreme Court recently held in Dhanraj and others Vs. State of Maharashtra, 2002 S.C. Cases (Cri) 1775;

> "Absence of doctor's certificate in certain case and in the peculiar facts and circumstances is not fatal to the prosecution. Such circumstances can be used as supporting evidence about the declarant's mental condition along with other evidence on record. According to the Hon'ble Apex Court it is now hyper technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the Magistrate categorically stated in his evidence indicating the question she had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration."

9. Therefore, what required is to see and appreciate the material placed on the record and the facts and circumstances of the present case, before concluding the issue. In the present case, we have also noted that there is no positive statement of the Doctor, that the deceased patient was in mentally and physically, fit condition. P.W. 7 has deposed and relied on the endorsement of P.W.8. P.W. 7 had not complied with all the detailed procedural aspect before recording dying declaration. The recording of dying declaration, in the present case, nowhere referees to

positive endorsement by both the witnesses P.W. 7 and P.W. 8 that he was mentally and physically fit to make the statement. The patient was conscious, that itself is not sufficient, in absence of any other corroboration, to accept such dying declaration, specially when it is not supported by other circumstantial evidence and or corroborative evidence in question. In the present case, there is nothing on the record to show that the patient was in a fit state of mind, while recording the dying declaration. Therefore, it is difficult to accept the dying declaration, as such to convict the appellant in the offence, as alleged.

10. The additional factor in above background which is also material that, as per prosecution case itself, the deceased and one Uday, defence witness had consumed 4 bottles of liquor and they were moving around, including the visit at odd hours, at the place of the appellant and on the same night. As per the prosecution, the incident took place at about 12.30 p.m. In this background, it is difficult to accept that mental and physical condition of the deceased was sound.

11. (P.W. 1) Ashok, (P.W. 3) Sardar, a panch

witnesses to the spot of occurrence were declared hostile. (P.W. 5) Rupali More, the daughter of the deceased and (P.W.6) Rukmini, the wife of the deceased were also declared hostile. There is no eye witness to the incident. One defence witness Uday has been examined in the present case, which supports the defence case, as raised by the appellant. This defence witness also supports the case and statements made by the hostile witnesses.

12. The another controversy is about the timing of the incident. As per the prosecution, the incident took place about 12.30 a.m. on 2/11/2001, whereas, other witnesses have deposed that the incident took place at about 4 a.m. on the same day. The certificate of the Doctor also supports the prosecution case, so far as timing part is concerned. However, other witnesses nowhere supports even this timing. P.W. 2 Bapu, the owner of the building has deposed that at about 4 a.m. he heard the noise of the deceased from 1st floor. Therefore, he along with his wife and daughter-in-law went to the second floor and poured water on the body of the deceased. This witness has further corroborated the prosecution case only to the incident that the deceased

had told them that the appellant had set him on fire. In his cross-examination he has deposed that the Beer Bar used to be open till midnight. There was one urinal for men on the first floor in the Beer Bar itself. He has deposed that he has not poured water on the person of the deceased. He has deposed that he had not telephoned to anyone. P.W. 2 was unable to say that" Dhondiram told him that the accused before the Court set fire on his person."

13. P.W. 4 Kabir, even though, he was declared hostile, has deposed that after receipt of the information that Dhondiram, the deceased set himself on fire and was injured. Therefore, they went to his place and found that Dhondiram Kurade had drunk alcohol in large quantity. He has further deposed that " when we were bringing Dhondiram Kurade to C.P.R. Hospital, Kolhapur at that time on the bridge of panchanama river, he tried to jump in the river." The suicidal attitude/nature of the deceased in the background, cannot be overlooked. This witness has also deposed that two and a half quarter liquor were less, from the stock and the 3 to 4 empty bottles of the liquor were lying in the Bar. The wife of the deceased also refused

to come with them. Nobody came from the house of the deceased to see him. P.W. 5 the daughter of the deceased also failed to support the prosecution case in all respect. Therefore, she was also declared hostile. They were not living with the deceased because he was in habit of heavy drinks. They were not even on talking terms with the deceased. P.W. 6, wife of the deceased has nowhere supported the prosecution case for the same reason.

14. The evidence of investigating officer therefore, also looses its strength to maintain the order of conviction as passed. The defence witness has supported the testimonies of other witnesses that the alleged incident took place at about 4 a.m. in the morning and not at 12.30 p.m. Therefore, this controversy of timing raises various doubts in the prosecution case. The defence witness nowhere supports the prosecution case, including the incident or even prior events before the incident. There is nothing to show that the appellant was present at the relevant time or before the relevant time near the spot of occurrence. There is no witness to support the prosecution case that the accused had committed the crime and ran away from the spot.

Therefore, except the aforesaid dying declaration, there is nothing which connect the appellant with the alleged crime.

15. The defence witness has deposed that he had bolted the door of the Beer Bar from the outside and there was no possi bility for the deceased to come out of the Beer Bar for urination. There was separate urinal in the Beer Bar itself and therefore, there was no need for the deceased to go out of Beer Bar for urination. The Beer Bar was used to open till midnight, even as per (P.W.4) Manager of the Beer Bar and therefore, the time of incident is also not proved by the prosecution.

16. For the reasons recorded above, we are of the view that the prosecution has failed to prove all the circumstantial evidence to connect the appellant with the crime in question. There are various lacunas, which goes to the root of the matter and raises various doubts in the prosecution case. Therefore, the conviction based on the dying declaration in question is not correct. There is merit in the appeal. The impugned judgment and order therefore, is quashed and set aside.

17. The appeal is allowed. The appellant is acquitted and he be set at liberty, if not needed for any other offence.

[V.G. PALSHIKAR, J.]

[ANOOP V. MOHTA, J.]